CASES
ARGUED AND DETERMINED
IN THE
Supreme Court
OF THE
STATE OF LOUISIANA.

EASTERN DISTRICT...JUNE TERM, 1830.

Eastern District. *June*, 1830.

REPPLIER *vs.* SYNDICS OF GOW.

REPPLIER vs. SYNDICS OF GOW.

If the wife has no property at the time of her marriage, and until the failure of herself and husband, the goods she attempted to pledge made part of a stock which was managed by the husband under her name, who acted as owner of it, except in the case of the pledge in which he is named as a third person to hold the goods, which he continued to retail as before, and there is no proof of a separation of property between them, it cannot be concluded that the stock of goods were other than community property. In such a case the husband cannot be considered as a third person holding the property for the pledgee.

APPEAL from the court of the first district.

The plaintiff claimed to be placed on the bilan of the insolvents as a privileged creditor, by virtue of an act, wherein the wife, one of the insolvents to secure the pay-

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APPEAL from the court of the first district.

The plaintiff claimed to be placed on the bilan of the insolvents as a privileged creditor, by virtue of an act, wherein the wife, one of the insolvents to secure the pay-

ment of six thousand dollars, represented herself as a public merchant, and pledged to him a slave and all her stock in trade. In the act it was stipulated that the goods pledged were put and should remain in the possession of the husband as a third person agreed upon by the parties. The act was passed on the twenty-eighth of July 1829, and the failure of the husband and wife took place in November of the same year. The business of the store, buying and selling goods, had been conducted entirely by the husband in the name of his wife prior to the execution of the act of pledge, and he continued in the same manner to transact the business up to the time of the failure. There was no evidence that the wife was possessed of any property at the time of her marriage, or that she had subsequently acquired any either by donation or inheritance. The court below dismissed the opposition, and the plaintiff appealed.

Duncan, for appellant.

The error of the court below is this, that the act of pledge making full faith between the parties to it, and not entered into at a suspicious time is binding on the creditors, and therefore Repplier is entitled to be

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placed on the tableau as a privileged creditor, for the full amount of the proceeds of the sale of the goods pledged to him. C. C. art. 3121, 3122, 3123, 3124, and 3125. *Martin's Reports*, n. s. vol. 5, p. 618.

Preston, contra.

This case presents a question of fact, whether the pledgee was put into the possession of the pledge, and the decision of the inferior court should prevail as to the fact of possession. The goods were changed every day as appears by the testimony, and intended to be thus changed from the very nature of the business, being a retail store. All the property pledged was acquired after the marriage, and therefore belonged to the community existing between the husband and wife, and of which the administration belonged to the husband. C. C. *art.* 2369, 2371, 2373. He is therefore in the act produced the real pledgor, and by the very act is to remain in the possession of the pledge. But possession by the creditor of the thing pledged is of the essence of the contract of pledge. C. C. *art.* 3119, 3129. The principle is extended to the antichrisis as well as the pawn. C. C. *art.* 3146, 3148, 3131, 3133, 3135, and 3140. As to the

necessity of actual possession in the creditor, and this possession must be real, not constructive. 8 *Mart. R.* 57, 58.

MATHEWS, J. delivered the opinion of the court. In this case the opposing creditor claims a privilege on the estate of the insolvents to the amount of six thousand dollars, alleging that property to that amount had been pledged to him by Mrs. Gow, who represented herself in the act by which the pledge was made as a public merchant. He is placed on the bilan as a privileged creditor only for one thousand one hundred and ninety-three dollars and twenty-two cents. And made opposition to its homologation, which being overruled in the court below, he took the present appeal.

In support of the privilege claimed by the appellant, reliance is had on the notarial act by which a slave and personal property were pledged for the amount claimed.

In opposition to this claim of privilege, it is contended on the part of the syndics,

1. That the goods pledged or given in pawn were never delivered to the pledgee or any third person to be held for him.

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2. That the act of pledge was made at a suspicious time, and under fraudulent circumstances.

The evidence of the case shows, that Mrs. Gow had no property at the time of her marriage; that from the eighteenth of February 1829, until the failure of her and husband in November of the same year, the business relating to the store of goods which she undertook to pledge to the appellant in July, (about three months previous to the cession of property made by the insolvents) was carried on in her name, by the agency of her husband; who seems to have acted in all things relative to this commercial business as owner of the goods, except the single act by which Mrs. Gow entered into the contract of pledge with the present opposing creditor.

By this act her husband was substituted by the consent of the contracting parties as a third person to hold the property pledged; he continued afterwards to retail the goods of the store in the ordinary mode of doing such business. The record affords no evidence of a separation of property between Gow and his wife, previous to the time at which she assumed the character of a pub-

lic merchant and sole trader. These facts preclude the possibility of belief, that the capital by which this commerce was carried on was other than the common property of the husband and wife, or perhaps that of the former alone. In either circumstance he cannot be considered as a third person capable of holding it for the creditor to whom the pledge was given, in conformity with the provision of the *art.* 3129 of the *L. C.*

If it was property common as being acquests and gains, the husband had a right to administer and dispose of it as his own. Considered as his *biens propres* the wife had still less right to assume over it the authority of an owner. As we are clearly of opinion that the contract of pledge or pawn, from all the circumstances attending it, gives no privilege or preference to the appellant; it is unnecessary to investigate the other grounds by which his claim would probably be equally defeated.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

If the wife has no property at the time of her marriage, and until the failure of herself and husband, the goods she attempted to pledge made part of a stock which was managed by the husband under her name, who acted as owner of it, except in the case of the pledge in which he is named as a third person to hold the goods, which he continued to retail as before, and there is no proof of a separation of property between them, it cannot be concluded that the stock of goods were other than community property. In such a case the husband cannot be considered as a third person holding the property for the pledgee.

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HUNTER & AL. vs. LEWIS.

HUNTER ET AL. vs. LEWIS.

If he who has a house to build stipulates that the builder will not claim any payment until the house be finished in a workmanlike manner, the material men and laborers, who have claims against the builder, cannot exercise any right against the owner until the builder complies with his contract.

APPEAL from the court of the first district.

The plaintiffs were employed by Tuthill, who contracted with the defendant to put a roof on his, the defendants warehouse. The suit was brought as well against Tuthill as against the defendant, (the owner of the building) for the price of the work. The petition stated, that the defendant was indebted to Tuthill in an amount sufficient to pay the plaintiffs' demand which was claimed by privilege. The defendant plead the general issue.

The evidence showed, that the entire roof consisting in part of slate, and in part of boards, was put on, but that the part consisting of boards leaked so much as to be unsafe for storage in wet weather. The work done by the plaintiffs which was of slate, was complained of, and it was in evidence that the defendant was indebted to Tuthill in an amount sufficient to pay the plaintiffs' demand. The defendant contend-

ed that he was not bound to pay either Tuthill or the plaintiffs, until the whole work was finished in a workmanlike manner. Of this opinion was the court below, and gave judgment accordingly. The plaintiffs appealed.

Dunbar, for appellants. *McCaleb*, for appellee.

MARTIN J. delivered the opinion of the court. The plaintiffs having been employed by Tuthill to slate the roof of his house, which he had undertaken to build for the defendant, brought suit for his payments against Tuthill, and made the defendant a party, to obtain a privilege on monies which he alleged to be due by him to Tuthill.

The present defendant pleaded the general issue; that he owed nothing to Tuthill, and notice had been given him by material men and labourers, that they were unpaid by Tuthill.

Judgment by default against Tuthill. He made a cession of his goods; placed the plaintiffs on his bilan. They discontinued the suit as to him.

Judgment was finally given for the remaining defendant, and the plaintiffs appealed.

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HUNTER & AL. *vs.* LEWIS.

If he who has a house to build stipulates that the builder will not claim any payment until the house be finished in a workmanlike manner, the material men and labourers, who have claims against the builder cannot exercise any right against the owner until the builder complies with his contract.

It appears the district judge was of opinion, that the evidence did not show the defendant was to pay any thing before the work was finished in a workmanlike manner, and neither Tuthill nor the plaintiffs could have any claim till this was effected, which was not yet the case.

It is clear then the case was before him on a question of fact. Several witnesses were heard in court, and it does not appear to us that his decision makes it our duty to interfere.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

SACERDOTTE vs. DURALDE.

The recorder of mortgages must make mention in his certificates of all donations recorded, and he has no discretion to exercise as to the validity or effect of the acts recorded.

APPEAL from the court of the parish and city of New-Orleans.

The plaintiff in several instances applied to the defendant recorder of mortgages, for a certificate of mortgage or no mortgage on his property. The latter always included

in the certificate a donation made by a third person to the plaintiffs' children. The petition stated that this form of certificate had operated to the injury of the plaintiff in the sale of his property, and concluded with a prayer for damages, and that the defendant be compelled to alter the form of his certificates. It was admitted that the defendant was recorder of mortgages at the institution of the suit, but had since resigned.

There was judgment for the defendant, and the plaintiff appealed.

Canon, for appellant.

1. The record of mortgages, and the book of donations, are altogether different, and kept in the same office only for the sake of convenience.

2. The recorder of mortgages must in his certificate relate only what is on the registry of mortgages.

3. The registry of donations is ordered and made for purposes totally different, and to operate only between the donor and the donee.

4. The deed of donation in this case can have no effect as a mortgage, because it is a donation of no determinate thing, moveable or immoveable; that no description of the

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thing given or the amount of its value appears, and that according to the code, nothing can be said to have been given.

5. That this pretended donation is to be tested according to the spirit of the ancient code, being made in 1820.

6. That the thing given not being within the jurisdiction of our courts, the plaintiff has no means of ascertaining its value, and offering a special mortgage.

Dennis, for appellee.

1. The recorder of mortgages is bound in his certificates, to mention the mortgages and the donations. *Old Code P.* 465, *art.* 56. *P.* 466, *art.* 58, 59. *New Code*, 3355, 3356, 3357.

2. The plaintiff being tutor to his minor children, the donation in their favor operates as a lien upon his estate, and must be recorded against him; if he wishes it raised, he should have brought suit against the under tutor of the minors, and not against the recorder of mortgages.

MARTIN, J. delivered the opinion of the court. The plaintiff complains, that the defendant recorder of mortgages, improperly insists in the certificates, he requires of him

a donation made by a third person to his, the plaintiffs' children, whereby he has lost several pieces of real property, the purchasers being deterred, seeing the mention of the donation in the certificates.

There was judgment for the defendant, and the plaintiffs appealed.

His counsel has urged, that

1. The books for the record of mortgage, and that of donations are distinct and different, and are kept in the same office for the sake of convenience only.

2. The recorder in his certificates, is to mention such mortgages as appear in the registry of mortgages only.

3. The registry of donations, is kept for quite different purposes than that of mortgages, and concern donors and donees only.

4. The deed of donation in the present case, can have no effect as a mortgage, it being no donation of a determinate thing moveable or immoveable; there is no description of the thing given, nor is its value mentioned.

5. We think the parish court did not err.

The donation was made under the *Old Code*, which required the recorder to record all donations presented to him for that pur-

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pose, 464, *art.* 56, and to deliver to any person, who shall request a certificate of the mortgage, and donations recorded in his book, and if no such thing exists his certificate shall contain a declaration of it, id. 466 art. 58. The *New Code* has a similar provision, 3356.

The recorder of mortgages must make mention in his certificates of all donations recorded, and he has no discretion to exercise as to the validity or effect of the acts recorded.

The recorder must make mention on his certificate, if all donations recorded, he has no discretion to exercise as to the validity or effect of the acts recorded.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs.

MILLER vs. COHEA.

It is not necessary to prove the defendant's signature to a note unless it be specially denied.

APPEAL from the court of the parish and city of New-Orleans.

To this suit, which was brought on a promissory note, the defendant pleaded prescription and the general issue. On the trial of the cause the plaintiff offered in evidence the note sued on, without adducing any proof of the defendant's signature.

The latter objected to its admission, but was overruled by the court on the ground that the answer of the defendant precluded the necessity of proving the execution of the note. There was a verdict and judgment for the plaintiff and the defendant appealed.

Conrad and *Egnew*, for appellant.

Preston, for appellee, made the following points:

1. It was unnecessary to prove the signature of the defendant, he not having formally denied the same. C. C. art. 2240, 2241; C. P. art. 324, 325.

2. The plea of prescription offered by the defendant is founded on the genuineness of the instrument sued on, and is inconsistent with a denial of its genuineness.

MATHEWS, J. delivered the opinion of the court. This is a suit on a promissory note, wherein the plaintiff obtained judgment and the defendant appealed.

The principal question in the cause arises on a bill of exceptions taken to the opinion of the court below, by which the note was allowed to be given in evidence to the jury without proof of the signature of the defendant.

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The answer contains the general issue and a plea of prescription. In support of the latter, reliance is had on the provisions of the *Louisiana Code*. But they afford no aid to the appellant, as may be seen by referring to the judgment in the case of the *Union Cotton Manufactory* vs. *Lobdell*, 7 *Martin, n. s. p.* 108.

As there is no specific denial of the signature to the note by the defendant, the solution of the question made by the bill of exceptions depends on a just interpretation of the *art.* 2240 of the *Louisiana Code*, and the *arts.* 324, 325 and 326 of the *Code of Practice*. These laws have already received a construction from this court unfavorable to the pretensions of the defendant, and no reasons have been adduced in the present case sufficiently forcible to produce a change in our opinion, as expressed in that of *Hughs* vs. *Harrison & wife*, reported in 8 *Martin, n. s. p.* 297.

It is not necessary to prove the defendant's signature to a note unless it be specially denied.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs.

MACDONOUGH vs. ELAM & AL.

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vs.
ELAM & AL.

A sheriff cannot sell an undivided part of a defendant's property, but must sell a distinct portion and then another until he has raised a sufficient sum.

APPEAL from the court of the first district.

The plaintiff obtained an order of seizure and sale, on certain lots of ground in the town of McDonough, upon which he had a mortgage. The sale was opposed by Mooney, who set up title in himself as having purchased the lots when sold by the state for taxes. In support of his claim, he produced in evidence a deed from the treasurer, by which it appeared that he had purchased all the right which the defendants had to certain lots *in the parish of Jefferson*, but there was no evidence that the lots claimed by the opposer, formed any part of those described in, and seized, under the plaintiff's mortgage. The court below dismissed the opposition, and the intervening party appealed.

Nixon and *Preston*, for appellant.

McCaleb, for appellee.

MARTIN, J. delivered the opinion of the court. The plaintiff or mortgage creditor of the defendants, obtained distinct writs of

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seizure and sale. Mooney obtained writs of injunction, on the ground that he had bought part of the premises at a treasurer's sale, for the collection of taxes. The cases were consolidated; judgment was given against the intervening party, and he appealed.

He claimed title under two deeds, for *twelve town lots in the parish of Jefferson*, in each one. It was admitted, that one of the defendants was the vendee of the appellee, for twenty-four, and the other for thirty-six lots, in the town of McDonough, in the parish of Jefferson, and that the lots sold by the sheriff made part of those sold by the plaintiff.

The appellant's counsel urges that his client had bought one undivided half of the twenty-four lots owned by one of the defendants, and one undivided third of the thirty-six owned by the other.

The appellee cannot be prevented from proceeding to the sale of the mortgaged property or part thereof, unless it be shown that there has been a legal alienation.

It is not pretended that there was a voluntary one.

A forced one can have no effect, unless it has been made according to law.

We are not acquainted with any difference between a forced sale for taxes, and one under a *fi. fa.* except the mode and period of advertising, and the form of the deed.

A sheriff must seize the property he sells, and have it ready to show, or point out to the purchaser that he may possess himself of it, if it be susceptible of actual possession. He cannot sell an undivided part of the defendant's property or chattel or piece of land. For many a purchaser would be deterred from buying that of which he could not obtain the possession without entering into a contract, or instituting a law suit, and the defendant, though he must submit to have a determinate and specific part of his property taken away cannot be compelled to have a co-owner unnecessarily and gratuitously imposed on him, with whom he must have a voluntary or legal partition.

A sheriff cannot sell an undivided part of a defendant's property, but must sell a distinct portion and then another until he has raised a sufficient sum.

In the present case less than ten dollars were due by one of the parties and ——— —— by the other, he therefore should have begun by selling one lot and then another, till he had raised a sufficient sum, or at least put up one determinate square, without selling at once twelve indefinite lots.

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Surely if a man has twenty negroes on whom taxes are due, and one of these may be taken and sold—and more if necessary: but the sale of one twentieth of all the slaves, would likely be productive of unnecessary sacrifice to the owner, and trouble to him and the purchasers.

He who sells his own property, may do so in any manner which will be agreed on by a vendee, but an officer who makes a forced sale has no right to carve out any particular estate unnecessarily and gratuitously, without the consent of the owner.

We conclude that the sale made by the treasurer, was irregular, and did we doubt the defendant's title to any specific part of the property, nothing prevents the plaintiff from proceeding with his writ of seizure.

It is therefore ordered, adjudged and decreed, that the judgment of the district court affirmed with costs.

THIBAUD vs. THIBAUD'S HEIRS.

To form a contract of deposit there ought to be a delivery, the principal object of which is the taking care of the thing deposited.

APPEAL from the court of probates of the parish and city of New-Orleans.

The plaintiff claimed the privilege of a depositor by virtue of a letter from the ancestor of the defendants wherein he acknowledged to have in his hands a sum of money belonging to the plaintiff, and which he held subject to her order. There was a judgment for the defendants in the court below and the plaintiff appealed.

Rodrigues for appellant.

Moreau and *Soulé* for appellee.

MARTIN, J. delivered the opinion of the court. The plaintiff and appellant complains of the judgment of the court of probates, which disallowed her claim to privilege, which she claimed as depository of two sums of money, for which she was recognized as chirographary creditor.

The evidence of the deposit is presented in the following acknowledgment of the de-

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fendant's ancestor. I acknowledge to have belonging to Miss S. Thibaud, five hundred and seventy-five dollars, which I will hold at her disposal. *Je reconnois avoir à Mlle. S. Thibaud, cinq cent soixante et quinze piastres, que je tiendrai á sa disposition.*

The evidence of the second deposit is in a letter in which the defendant's ancestor informs the plaintiff he has settled some concern of hers, in which nine hundred and ninety-three dollars are coming to her, which he says he will keep to her order: *que je tiendrai à tes ordres.*

We think the judge of probates did not err.

As to the first sum, it does not appear how it came to the hands of the defendant's ancestor: To form a contract of deposite there ought to be a delivery, the principal object of which is the taking care of the thing deposited. *Pothier, contrat de dépôt ch.* 1. *art.* 259. *Civil Code*, 410, *art.* 1 and 2, 412, *art.* 8. *Pothier* cites, among other authorities, *H.* 16, 3, 1. *Si tibi mandavero ut rem ab alique meo nomine receptam custodias, idque feceris ; mandatian depositi tenearis et magis probat mandati esse actionem, quia fuerit prismus contractus.* Nothing shows that the

To form a contract of deposite there ought to be a delivery, the principal object of which is the taking care of the things deposited.

money was received or a delivery to keep.

The party received the money as the plaintiff's agent or negociant.

The case is stronger in favor of the defendants, as to the second sum. The quotation from the *Digest* is particularly applicable to it. *Durnford* vs. *Segher's syndics*, 9 *Martin*, 420.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed with costs.

DELANCY vs. BEALE & AL.

Whenever an onerous contract is sought to be enforced by a natural child beyond what the law authorizes the parent to grant, and contrary to the interest of legitimate descendants, the presumption arises that it was made for the purpose of disguising an illegal donation—and the *onus probandi* is on the plaintiff to establish the genuineness of the contract.

APPEAL from the court of the first district.

On the 1st of January 1820, Thomas Beale, sen., made his promissory note to the order of his natural son Thomas Beale, jun., for $5000. Thomas Beale, sen. and

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Thomas Beale, jun. being both dead, the mother of the latter brought this suit against the widow and minor children of the former, to recover the amount of the note. The defence set up was, that the note was a disguised donation from the father to his natural son. There was judgment for the plaintiff in the court below and the defendants appealed.

Seghers, for appellant.

1. It is in evidence that Thomas Beale, jun. in whose favor the note sued on was drawn by Thomas Beale, sen. was the natural son of the drawer. It appears from the testimony that Beale, sen. had legitimate children, the present defendants.

The presumption therefore is, that this was a disguised donation from the father to his natural son, which is declared null and void by art. 17, page 218, Old C. C. It is presumed to have been intended to elude the prohibition pronounced by art. 12 p. 210 of the same code. This point was pleaded in the answer and the consideration of the note expressly denied—under these circumstances it was incumbent on the plaintiffs to prove the consideration, and the judge *a quo* erred

in considering the note *prima facie* evidence thereof, and in throwing on the defendants the *onus probandi* that no consideration had been received for the note.

McCaleb, contra.

1. The note sued on is in the usual form of a commercial transaction. It is a contract in writing acknowledging value received and by the law regulating such contracts is presumed to be for the consideration expressed.

2. Natural children or acknowledged bastards cannot receive from their natural parents by *donation*, &c. art. 12, p. 210, old code. This article surely does not forbid a natural father to *contract* with his natural son—if this were a donation, the law would be good; but it is an onerous contract, and therefore not governed by the law cited. The next law quoted is art. 17 p. 212 O. C. C. which says, 'Every disposition in favour of a person incapable of receiving shall be null whether it be disguised under the form of an onerous contract or be made under the name of persons interposed.' This is true, but the appellants must show that the note sued on (which is presumed good by the law merchant) is a disguised disposition in favor of Beale, jr.

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3. No law has been cited to show that a natural father cannot contract by note to a son, without showing the consideration.

4. It is not shown but what the father was able to give his legitimate children all that they could require by law. Old Civil Code, p. 212, art. 19.

MATHEWS, J. delivered the opinion of the court. This suit is brought to recover from the succession of Thomas Beal, sen., the amount of a promissory note, made payable by him to his natural son, Thomas Beal, jun., who was also the natural child of the plaintiff Delancy, who claims as his heir. The court below gave judgment against the defendants, from which they appealed.

The note was made in New-Orleans, on the first day of January, 1820, for five thousand dollars, payable two years after date, with interest at the rate of six per cent. per annum. Its execution is admitted, but the defendants contend that it is void for want of consideration, as being intended to cover a donation from the father to his natural son, contrary to the laws of this state, as in force at the time of the contract; the promisor then having legiti-

mate descendants, a fact now admitted, and that they are still in existence.

According to the former *Civil Code*, from which the rules applicable to the present case must be derived, natural children or acknowledged bastards, cannot receive from the natural parents, by donation *inter vivos* or *mortis causa* beyond what is strictly necessary to procure them sustenance, or an occupation or profession, which may maintain them, whenever the father or the mother who has thus disposed in their favor, have legitimate children or descendants. *Old Code, p.* 210, *art.* 12: *art.* 17 found at *p.* 212, declares every disposition in favor of a person incapable of receiving, shall be null, whether it be disguised under the form of an onerous contract, or be made in the name of persons interposed.

In interpreting these provisions of law, in order that they may have the effect intended by the legislature, whenever an onerous contract is sought to be enforced by a natural child beyond what the law authorizes the parent to grant, and contrary to the interest of legitimate descendants, such contract ought to be received with suspicion, and the presumption fairly

Whenever an onerous contract is sought to be enforced by a natural child beyond what the law authorizes the parent to grant, and contrary to the interest of legitimate descendants, the pre-

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arises that it was made for the purpose of disguising an illegal donation. This presumption once admitted, throws the burthen of proof on the plaintiff to establish the genuineness of the contract. No evidence to this effect has been adduced in the present case. We are of opinion that the district court erred in rendering judgment for the plaintiffs and appellees.

sumption arises that it was made for the purpose of disguising an illegal donation —and the *onus probandi* is on the plaintiff to establish the genuineness of the contract.

It is therefore ordered, adjudged and decreed, that the said judgment be avoided, reversed and annulled: and it is further ordered, adjudged and decreed, that judgment be here rendered in favor of the defendants and appellants, with costs in both courts.

ATWILL vs. BELDEN & CO. & AL.

The situation of an insolvent debtor is analogous to that of one who has ceded his goods—in either case all passive debts of the debtor may be exacted whether the day of payment has or has not arrived.

The purchaser of the property of an insolvent debtor, on the sale being declared illegal, has the option of paying the creditor or surrendering the property; if he does neither, execution may issue against him.

APPEAL from the court of the first district.

The plaintiff, a creditor of William B.

Belden & Co., brought this suit to recover the amount of his claim, and to set aside a sale which Belden & Co. made to their co-defendant Jones, of all their stock in trade, amounting to twenty-seven thousand dollars. It was proved on the trial, that Jones was a creditor of Belden & Co. for a large amount, and that the latter were in insolvent circumstances at the time of the sale. It further appeared that the plaintiff's debt was not yet due at the institution of the suit. There was judgment for the plaintiff in the court below, and the defendants appealed.

Maybin and *Linn*, for appellants.

1. The suit was prematurely brought, the time not having expired which the debtor had to pay the debt. N. C. C. art. 1796, C. P. art. 158, 14.

2. The contract between the debtor and defendant is not to be avoided, because the debtor has sufficient property to pay complaining creditor. C. C. art. 1966.

3. The contract between the debtor and defendant cannot be rescinded, because the sale was in the usual course of business, the consideration just, and it has not operated

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to the injury of the complaining creditor. N. C. C. art. 1981, 1973; *Baudin* vs. *Roliff & al.* 1 M. n. s. 6, p. 177.

4. The judgment of the inferior court is erroneous, as it makes the defendant's property liable for the debtor's debts.

Watts, for appellee.

1. The debt is fully established against Belden & Co.

2. The fraudulent transfer is fully made out.

MATHEWS J. delivered the opinion of the court. In this case the plaintiff alleges that the defendants, Belden & Co. are indebted to him; that they are in insolvent circumstances, and being thus situated, they sold all their property to Jones, one of their creditors, (who is made a party to this suit,) for the purpose of securing to him the payment of a large sum of money, in fraud of the rights of the petitioner, who claims judgment against his debtors and a rescission of the sale, so far as it affects his interest. The court below gave judgment according to the prayer of the petition, from which the defendants appealed.

This action is based on the provisions of the *Louisiana Code*, which grant to credi-

tors the privilege to sue for the avoidance of contracts made by their debtors with other persons, in fraud of their rights.

It may be maintained by an individual creditor, when there is no cession of goods, and by the representatives of all the creditors when there is a cession. The individual creditor, who wishes to avail himself of this action, must either have his debt liquidated by a judgment, or make the purchaser of the property of his debtor a party to the suit for the liquidation of his claim.

A purchaser thus made party, may claim the benefit of discussion of the property of his vendor, in nearly the same manner as prescribed for sureties, &c. In a suit commenced in this form, either of the defendants may controvert the demand of the plaintiff. *Code, art.* 1965, 1966, 1967, 1968, and 1970.

The present suit, it is seen, is one prosecuted by an individual creditor, in which his debtors and their vendee, are both parties. The solvency of the former is put at issue; and the evidence shows that they were insolvent, or at least unable to meet their engagements at the time of the sale of their property to the defendant Jones. He took

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it, partly in payment of a large debt due to himself, and partly for a stipulated sum to be paid to their creditors; but amongst these, the plaintiff was not placed on their schedule. This contract in relation to him, is infected with legal fraud: although, perhaps, it may give no immoral taint to the transaction on the part of the purchaser, whose object appears to have been to secure a just debt. The plaintiff is therefore authorized, under the provisions of the *Code*, to demand the nullity of the sale, so far as it affects his rights.

One objection to the correctness of the judgment of the district court is common to both defendants: *i. e.* that the term of credit on which the goods were sold to the plaintiff, had not expired at the time this suit was instituted.

The situation of an insolvent debtor is analogous to that of one who has ceded his goods—in either case all passive debts of the debtor may be exacted, whether the day of payment has or has not arrived.

The fact of insolvency being established by the evidence of the case, we consider the situation of the debtors as analogous to that of persons who make a cession of their property to their creditors, from which the legal consequence is, that all debts may be exacted, as well those which had time granted for their payment, as those actually payable. In this respect there is, therefore, no error in the judgment of the court below.

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On the part of the defendant, Jones, the privilege of having the property of the debtors discussed, is claimed: but as he did not pursue the requisite steps in the first instance to cause this to be done, the claim is now unavailable for him. The last error assigned, relates to that part of the decree which authorizes execution to be taken against the buyer. This privilege is granted to the plaintiff only in the event of the purchaser failing to surrender the property of the debtors in execution, or paying the amount of the judgment out of its proceeds, should it have been by him sold: having this alternative, if he fails to comply with it, no reasonable grounds of complaint exist against compelling him, by execution, to satisfy the judgment.

The purchaser of the property of an insolvent debtor, on the sale being declared illegal, has the option of paying the creditor or surrendering the property; if he does neither, execution may issue against him.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

HODDER vs. SHEPHERD & AL.

Suit against a third possessor by a forced heir for his *legitime*, cannot be brought until the donee's or legatee's property be first discussed.

APPEAL from the court of the first district.

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vs.
SHEPHERD & AL.

The plaintiff claimed the legitime of the estate of her brother, Edward Pearse, as forced heir of their common mother, who, surviving, was the forced heir of her son Edward. She also claimed by virtue of the will of her mother, as her universal legatee. The defendant was a third possessor of the estate claimed, and derived title from the universal legatee, under the will of Edward Pearse. There was judgment for the plaintiff, and the defendant's warrantor appealed.

Livermore, for appellant.

By the Code of 1808, art. 26, it is provided, that a donation exceeding the disposable portion is not null, but only reducible, and the art. 29, points out the mode in which the reduction shall be made. Against whom should the action be regularly brought? Against the donee, for he alone is competent to litigate the matter, and to show the amount of property and debts. But by article 39, an action is given against the third possessor—in what manner? Only after a discussion of the property of the donee. All the property of Pearse was given to Nelder, and this donation was originally and *prima facie* valid. It was however exorbitant, and subject to reduction. But so long as the

mother of Pearse did not sue for a reduction, he might dispose of the property. The title of his vendee would be good so long as a reduction was not sued for, and so long as he had sufficient property to pay the legitimate part. Until an action has been brought against him, an execution taken out against his property, and that remedy found insufficient, the person entitled to the legitime, cannot come upon the third possessor. The property is indeed hypothecated, and liable for the deficiency; but that deficiency must be legally established. When that has been done, recourse may be had upon the property alienated. C. C. art. 38, 37, p. 216.

Hennen, for appellee.

MARTIN, J. delivered the opinion of the court. This is a suit against a third possessor by a forced heir, for two undivided thirds of a plantation and slaves, being the legitime or portion of which the deceased could not dispose. The plaintiff had judgment, and the defendant, warrantor appealed.

We think the suit was prematurely brought, the donee or legatee's property not having been first discussed. This was a

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condition precedent under the former *Code*, 216, *art.* 37, and is so under the *new*, 1504.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be annulled and reversed, and that there be judgment against the plaintiff and appellee, as in case of non-suit, with costs in both courts.

COUGOT vs. RODRIGUEZ.

The instructions from one partner to another when both are equal in interest, are to be considered in the nature of advice, subject to be deviated from according to circumstances.

APPEAL from the court of the first district.

The facts in this case are fully given in the opinion of the court delivered by MATHEWS, J.

This is a suit instituted on accounts in which the plaintiff claims several items amounting in all to one thousand eight hundred and thirty-one dollars and fifty-three cents. The defendant pleaded in reconvention, and set up accounts by which he attempted to show that the plaintiff was indebted to him, &c. Judgment was ren-

dered in favor of the original plaintiff for one thousand three hundred and thirty-eight dollars and two cents, from which the defendant appealed.

The contest between the parties arises out of an adventure of goods made from Mobile to Tabasco, in the republic of Mexico. It consisted of Spanish rum and wines, in the greatest part, which at the time were prohibited from being introduced into the ports of that republic. The total value of the goods amounted to six thousand five hundred dollars, for which the defendant gave his notes, payable to the seller by certain instalments. It appears that he had a partner at Tabasco, between whom, himself, and the plaintiff, the adventure was to be divided; three-fourths to each of the former, and one-fourth to the latter. The three taking on themselves, in these ratios, all chances of gain and loss. The shipment of the goods from Mobile to their place of destination, was intrusted to the management of the plaintiff, under instructions from the defendant. This was effected through the agency of another person, who received the goods, less in quantity than had been purchased, and paid about two hundred and

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fourteen dollars for cooperage and storage on the pipes and casks, and then caused them to be shipped all at one time, in a vessel which had been chartered in New-Orleans. They arrived at Tabasco and were landed in safety, except twenty-eight pipes of rum, which were seized and confiscated.

The defendant and reconvenor claims, (according to the argument of his counsel in this court,) a deduction from the sum sued for, of the whole amount of cooperage and storage, two hundred and fourteen dollars; one thousand and eighty-two dollars, the value of the goods not delivered by the seller, and three-fourths of eight hundred and forty dollars, the loss of capital by the seizure and confiscation of twenty-eight pipes of Havana spirits, making together one thousand five hundred and nine dollars.

We are of opinion that the evidence of the case authorizes a deduction from the plaintiff's account of the whole value of the deficiency in the goods, say one thousand and eighty-two dollars, and also the sum paid for repairing the pipes and casks, one hundred and twenty-two dollars; this amount being properly charged to the seller, who was bound to deliver them in

good order, and the charges for repairs should have been taken from the price which the purchaser promised to pay. In the account rendered by the plaintiff, which is the basis of his action, he gives a credit for six hundred dollars, deducted from the amount payable for the goods, as being that much deficient. The evidence is not clear in this respect: it is somewhat contradictory, and we are unable to discover any good reasons for coming to a conclusion on this point, different from that of the judge of the district court, which added to the credit of six hundred dollars, four hundred and eighty dollars. The storage was chargeable to the purchaser after the sale, and ought not to be borne by the plaintiff.

The most difficult question remains to be settled, that is whether the whole loss by the confiscation of the twenty-eight pipes of Havana spirits, should be suffered exclusively by the plaintiff, or be borne by all the partners in the adventure, in proportion to their respective shares.

The same instrument which contains the instructions given by the defendant to the plaintiff, conveys to the latter an interest of

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one-fourth in the goods which were purchased by the former, and constitutes him a partner in the commercial adventure to that amount, taking on himself the chances of gain or loss. After thus becoming a partner, he acquired a right to conduct the business of the concern. In truth the duty of chartering vessels, receiving the merchandize from the vendors, and shipping it to the place of destination, devolved on him by express agreement, and for this purpose he was authorized to employ an agent, as appears by the terms of the instructions, whereby he was requested to give certain orders to the person whom he might commission to receive and ship the goods. Situated as these parties were in this business, being partners, it is proper to consider the instructions given by the defendant, in the nature of advice from one person to another, when both are equal in power and interest, and subject to be deviated from should circumstances require or point out a different course of proceeding, as probably more beneficial. The great objection to the conduct of the acting partner or his agent, in relation to the adventure undertaken, is in shipping the goods all at the same time in one vessel, instead of two,

The instructions from one partner to another when both are equal in interest, are to be considered in the nature of advice, subject to be deviated from according to circumstances.

or in the same vessel at different times, as advised by the defendant, in order to avoid or elude the risk of landing them in contravention of the laws of Mexico.

When we take into consideration that these goods were reduced one-sixth part in quantity, and the high rate of freight at which they would necessarily be carried by dividing the remainder, and sending it at different times, as it would have been necessary to charter a vessel for each trip at the rate of twelve or thirteen hundred dollars per voyage, we are not ready to admit that any fault has been committed by the plaintiff in the manner adopted by his agent for the transportation of this merchandize.

The loss (as estimated) by confiscation, is eight hundred and forty dollars. Now the costs of a second voyage, if it should have been any thing like the first, would have amounted to more than this sum: and had not the goods been divided in their shipment, the loss would have inevitably occurred.

This is however determining the prudence of the measures resorted to by the plaintiff, rather by their result, than by previous probabilities, which is perhaps not a

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bad test of judgment and discretion in mercantile pursuits.

There appears to be a small error in the judgment of the district court, arising from a mistake in calculation. The aggregate of the sums claimed by the plaintiff is one thousand eight hundred and thirty-one dollars and fifty cents; the deduction from that sum, which in our opinion should be made, amounts to six hundred and four dollars, leaving a balance of one thousand two hundred and twenty-seven dollars and fifty cents.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be avoid, reversed and annulled. And it is further ordered, adjudged and decreed, that judgment be here entered in favor of the plaintiff and appellee, for the sum of twelve hundred and twenty-seven dollars and fifty cents, (1227 50) and that he pay the costs of this appeal; those of the court below to be borne by the defendant and appellant.

TOWNSLEY & AL. vs. SPRINGER.

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TOWNSLEY AND AL. *vs.* SPRINGER.

Notice by mail to the indorser, must be put in the post-office the next mail day after the protest, otherwise the indorser is discharged.

APPEAL from the court of the first district.

Ante p. 122. A rehearing having been granted in this case, it was argued a second time at this term, and MARTIN, J. delivered the opinion of the court.

This is an action against the endorser of a promissory note, and the only question is the sufficiency of the protest.

Paxton, the maker of the note, deposed that at the time it was given, the defendant was clerk of the steam-boat Washington, and was so during the last year. The witness believes that at the period of the protest, neither the defendant nor the boat were in New-Orleans. She traded between New-Orleans and Louisville, and when the water permitted, to Cincinnati.

Gainnié, a clerk of the plaintiff, deposed that on Sunday the 14th of June last, at 9 o'clock in the forenoon, he put into the post office, in New-Orleans, a letter directed to

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the defendant at Louisville. A notice of the protest, directed to the defendant had been left at the plaintiff's counting house, by the notary, on the preceding Friday, the 12th, at 11 o'clock of the forenoon. The plaintiffs received notice of the protest on Wednesday the 10th, or Thursday the 11th. The witness knows the defendant, but not whether he was in the city at the time; the steam-boat was not in port. The defendant was the clerk of the boat, and had been employed on board of steamboats for two years before. The letter put by the witness in the post office contained the notice of protest.

Regnaud, another clerk of the plaintiffs, deposed he accompanied the preceding witness to the post office, and believes the letter there put in for the defendant contained notice of the protest. Sunday the 14th was the first mail day for Louisville after the protest, inclosed to the defendant, had been left at the plaintiffs' counting house.

Caseau, a clerk of the post office, and a witness for the defendant, deposed that the mail for Louisville in June last, left New-Orleans on the Sunday, Wednesday, and

Friday of each week, and was closed at 10 A. M.

Tourne, a witness of the defendant, deposed that for several years past, the steamboat Washington had been laid up at Louisville during the stage of low water, for the purpose of having the necessary repairs made; the defendant has been clerk of that boat for four or five years. The letters of Byrne, to whom the witness is clerk, written to the defendant, were, during the summer season, directed to Louisville.

Gainnié, recalled, deposed he believed that in general, when steam-boats are laid up at Louisville or Shippingport, the crews and persons belonging to them are paid off and do not remain on board.

The note was protested on Wednesday the 10th. The protest is in the hand writing of the notary, except the word "Louisville," in the superscription, which is in the hand writing of one of the plaintiffs.

As the fact of the protest is the notary's certificate, that on Thursday the 12th, he gave notice of the protest to the plaintiffs, and on their request he handed them the notice for the defendant, and afterwards, on

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Tuesday the 16th, at the plaintiffs' request, he forwarded notice to the defendant, directed to Cincinnati, Louisville and Frankfort.

The plaintiffs have relied on *Chitty on Bills*, (*Ed.* 1826,) 213, and authorities there cited; 12 *East*, 433; 1 *Gow*, 81; 5 *English Common Law Reports*, 471; 15 *idem*, 242; 2 *Caines*, 227; 1 *Johnson*, 294; 1 *Peters*, 583; 2 *Campbell*, 287; 2 *Peters*, 282; 6 *Martin's Reports*, 328.

Notice by mail to the indorser, must be put in the post office the next mail day after the protest, otherwise the indorser is discharged.

We are of opinion the plaintiff has failed to prove the use of due diligence in giving notice. The Friday mail ought to have been improved. It is no evidence that for four or five years, the defendant was clerk of the Washington steam-boat, which ran between New-Orleans and Louisville, and during high water, to Cincinnati. The plaintiffs, it appears, knew, or believed, that Louisville was the place to which notice was to be sent: they have not shown that they obtained this knowledge, after the departure of the Friday mail, nor that before its departure they took any step to ascertain where notice should be sent. They cannot avail themselves of their own act, after the departure of the Sunday mail, to

prove from their sending notice to Frankfort, Cincinnati, &c. that they were ignorant of the defendant's residence. This may have been an after thought.

We think that as soon as the plaintiffs received notice of the protest, it was their duty to have taken some step, if they were ignorant of the defendant's place of residence, to discover it. Their conduct rather shows their knowledge than their ignorance of the defendant's place of residence, for they appear to have directed their notice to the proper place. If they came to this knowledge after the departure of the Friday mail, they might have shown it. *Chitty*, 375; 3 *Johnson's cases*, 89; 3 *Campbell*, 362; 7 *Martin, n. s.* 323, 585; 11 *Martin*, 452; 10 *Martin*, 89; 7 *Martin*, 326; 12 *Wheaton*, 589; 1 *Mason*, 76; 2 *Peters*, 102; 13 *Johnson*, 432; 6 *Mass.* 386; 1 *Hugh*, 108.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that there be judgment, as in the case of a non-suit, the plaintiffs pay costs in both courts.

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SAVENAT & AL. vs. LE BRETON & AL.

SAVENAT & AL.
vs.
LE BRETON
AND AL.

Property conveyed to the husband in lieu of a sum of money inherited by the wife, is paraphernal.

The rigor of the law, which declares that property acquired during marriage, shall be considered as common to both husband and wife, although purchased with the separate funds of one of them, is applicable only to acquisitions made by purchase, and does not necessarily include things which may be received by either of them, in payment for money due to them in their separate and individual rights.

APPEAL from the court of the parish and city of New-Orleans.

This suit was brought by the wife, to recover a lot of ground, which she claimed as her paraphernal property, and which had been sold by her husband to the defendant.

It appeared from the evidence, that the portion of the plaintiff in the succession of her father and mother, had been deposited in the hands of her aunt, who conveyed the lot in question to the husband, in discharge of the debt. In the act, the husband acknowledged that he received the lot as part of the plaintiff's paraphernal estate.

There was judgment for the plaintiff, and the defendant appealed.

Moreau and *Soulé*, for appellant.

De Armas, for appellee.

MATHEWS, J. delivered the opinion of the court. In this case the plaintiff claims a lot of ground, situated in the suburb of St. Mary, as having a right thereto in consequence of its being her paraphernal property. The title set up on the part of the defendants, is derived from the husband of the plaintiff. Judgment was rendered in her favor in the court below, from which the defendants appealed.

It appears from the testimony and documents of the case, that the husband of the plaintiff received a title to the lot in question for and on account of a sum of money, which was due to his wife from the succession of her father and mother, and which had been deposited in the hands of her aunt, who conveyed the lot in discharge thereof to her niece, through the agency of the husband of the latter.

From these facts a legal question is raised, whether the property thus acquired by the wife, be a part of the community of acquests and gains belonging to both her and

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her husband, or whether it constitutes a part of her separate estate, as being paraphernal.

This question must be decided according to the provisions of the Spanish laws, relating to rights which subsist in the marriage state between the parties to the matrimonial contract.

By these laws, every thing purchased during the marriage, fell into the common stock of gains, and at the death of either of the parties, was to be divided equally between the survivor and the heirs of the deceased. And this effect was produced, whether purchases were made with the money or capital of the community, or with that of either of the married parties, whether in the name of both, or that of one of them separately. See *Febrero add. part. 2, lib.* 1, *chap.* 4, *sec.* 1, *no.* 6.

In the number immediately succeeding, several exceptions are stated to this rule, but neither of them directly embrace the situation of the plaintiff in the present case; although that which relates to the disposition of dotal property should perhaps bring within its equity, any disposal of paraphernal estate.

Property inherited by either husband or wife, or which either of them acquired by donation separately, was considered by the Spanish laws as the separate and distinct goods of the acquirer.

If in the present case, the sum of money which the plaintiff inherited from her parents had been received by her or her husband for her, no doubt could be entertained of its making a part of her paraphernalia. And it seems to us that justice and equity require that the property received in lieu thereof, should have the same destination.

Property conveyed to the husband in lieu of a sum of money inherited by the wife, is paraphernal.

It is true, that a *donation in payment*, is similar to a sale; so is an exchange of property *sid semele non est idem*. The rigor of the law, which declares that property acquired during marriage, shall be considered as common to both husband and wife, although purchased with the separate funds of one of them, is applicable only to acquisitions made by purchase, and does not necessarily include things which may be received by either of them in payment of money due to them on their separate and individual rights. This decision being made under the influence of the Spanish laws, has no relation to the doctine of

The rigor of the law, which declares that property acquired during marriage, shall be considered as common to both husband and wife, although purchased with the separate funds of one of them, is applicable only to acquisitions made by

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matrimonial rights, as established by our *Codes*, which perhaps would be more favorable to the claim of the plaintiff, than the former laws.

We think the judgment of the court to be correct. It is therefore ordered, adjudged, and decreed, that it be affirmed with costs.

purchase, and does not necessarily include things which may be received by either of them, in payment for money due to them in their separate and individual rights.

DELANCY vs. BEALE.

The district court cannot act on claims against a succession.

In 1819, Thomas Beale, sen. conveyed all his property, by notarial acts, to his natural son Thomas Beale, jr., for one hundred and twenty-four thousand dollars, for which he took his notes, with reservation of mortgage. Shortly after, Beale, sen., died intestate, leaving a widow and minor children, but no proceedings in the probate court were had upon his estate. Beale, jr. resided with his father until his death, and afterwards possessed and controlled the property until *he* died in 1823. The estate was inventoried and sold as that of Beale, jr. Mrs. Beale, the widow of Beale, sen. bought in a large portion of it, and gave her notes with mortgage, according to the condi-

tion of the sale. Upon the filing a tableau of distribution by the curator of Beale, jr., she appeared in her own behalf, as partner in community, and as tutrix of her children, and claimed to be placed on the tableau as a privileged creditor under the sales of 1819, of the father to the son. This was opposed by the natural mother (the plaintiff in this cause) as beneficiary heir, and also by the creditors of Beale, jr., upon the ground that the sales of 1819 were simulated and void, as made by the father to his natural son, for the purpose of protecting his property from the reach of creditors. These sales were accordingly declared null, and the property sold by these acts of 1819, was ordered to be restored to the widow and heirs of Beale, sen., to be administered according to law.

The present action was instituted upon the notes given by Mrs. Beale, for property purchased at the sale of Beale, jr.'s estate. A want of consideration was pleaded, and after judgment for the defendant, the plaintiff appealed.

McCaleb, for appellant.

Seghers, for appellee.

MARTIN, J. delivered the opinion of the court. The plaintiff, beneficiary heir of

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DELANCY *vs.* BEALE.

Thomas Beale, jr., brought suit on sundry notes of the defendant, given for property purchased at the sale of the estate.

The answer sets forth that the consideration of the notes has failed, the property purchased having been declared to have been acquired under a simulated sale, which has been judicially set aside. There was a prayer for the cancelling of the notes.

There was judgment for the defendant, and the plaintiff appealed.

The record shows that the facts stated in the answer are true: but the appellee has urged that the estate of his son has large claims on those of his father, the defendant's husband, for improvements on the premises, large advances and long services.

Admitting this to be true, these claims are to be preferred against the defendant and the heirs of her husband: the district court could not have acted on them in the present suit.

The district court cannot act on claims against a succession.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

MORGAN & AL. vs. THEIR CREDITORS.

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MORGAN & AL.
vs.
THEIR CREDITORS.

A creditor, who, on receiving a new note, surrenders the first, novates his debt: the sureties it had for the payment of the first, are discharged, and the accommodation endorser must be so if his name be not on the note taken to renew the former.

APPEAL from the court of the first district.

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MARTIN, J. delivered the opinion of the court. The Bank of Orleans is appellant from the judgment in this case, which decreed a debt of twenty thousand dollars, resulting from an accommodation note, executed by Morgan on the sixth of December, 1824, and then discounted by the bank, and afterwards renewed several times, and finally reduced to thirteen thousand dollars, now due, on a note of the 17th of October, 1825. In the meanwhile, the Louisiana Code has been promulgated, and the law thereby changed, whereby the bank is placed in a worse condition, than they were when the twenty thousand dollars was discounted.

We think the district judge did not err. A creditor, who, on receiving a new note, surrenders the first, novates his debt: the

A creditor, who, on receiving a new note, surren-

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sureties it had for the payment of the first are discharged, and the accommodation endorser must be so, if his name be not on the note taken to renew the former.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

ders the first, novates his debt: the sureties it had for the payment of the first, are discharged, and the accommodation endorser must be so if his name be not on the note taken to renew the former.

ARAYO vs. CURRELL.

If the owner of a vessel, residing in New-Orleans, sends her from Vera Cruz to Havana, he will be liable for the *torts* of the master, not according to the laws of Louisiana, but those of Mexico.

The courts of Louisiana having knowledge of the laws of Spain, and that they, before the revolution in South America, were the laws of the new republics, will decide cases according to those laws, unless they are shown to be abrogated.

APPEAL from the court of the first district.

The petition set forth that the plaintiff and child, with a number of other proscribed Spaniards, embarked at the port of Vera Cruz, on board the ship Belle for Havana, of which ship McKnown was master and the defendant owner: that, after being out thirty days, the ship grounded near the mouth of Rio de Lagarte, on the coast of Yucatan: that the captain told the passen-

gers, with the exception of twenty, to go ashore for the purpose of lightening the ship and getting provisions: that while on shore the captain set sail and left them exposed not only to privations and hardships, but to imprisonment, for having returned to the Mexican territory in contravention of her laws. The plaintiff and child, in order to procure a passage to Havana, went to Sisal, from thence to Merida, whence they embarked. The plaintiff claimed three hundred dollars damages, and to be reimbursed the passage money which he had paid at Vera Cruz.

The facts stated in the petition were fully proved on the trial, and the answer set up the following grounds of defence:—

1. That the owner was not bound to return the passage money after the voyage had commenced, and,

2. That the act of the captain in leaving the plaintiff and child on shore, was not within the scope of his agency, and that the owner could not be held liable.

There was judgment for the plaintiff and the defendant appealed.

Duncan, for the appellant, cited Abbot,

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page 276, 3d Johnson, 338, 3d Pickering, 23, 24, 25, and C. C. art. 2299.

Preston, for appellant.

MARTIN, J. delivered the opinion of the court. This case turns upon the same principles as that of Malpica vs. Currell, lately decided in this court.

The first question it presents relates to the law by which the rights of the parties are to be governed.

The defendant sent his vessel from New-Orleans to Vera Cruz, to be employed in the transportation of passengers—and the master there entered into a contract for their passages, which being within the scope of his authority, must be as binding on the defendant, as if it had been entered into by him personally. This proposition is, however, strenuously combatted by his counsel, who contends that the master had no authority to bind the owner absolutely, but only to the amount of the value of the vessel and freight; because the laws of the country, in which the owner has his domicil, fix the measure of his responsibility, on all contracts made by the master; that the question, whether an agent has exceed-

ed his powers, must be solved by the laws of the place in which he received them.

The admission of this position would still present the question, whether, according to the laws of Louisiana, the agent who contracted in Mexico, in the manner the master did in the present case, exceeded his powers; and the question would still remain open as to the laws which ought to govern. So it would be under the provision of our code, relied on, that the principal is bound only for the acts of his agent which he could have prevented. So, if it be held that the law of Mexico is to govern a contract directed to be made there, the question would not be whether the agent exceeded his powers, but what responsibility the principal would have incurred, had he contracted personally.

This has appeared to us the sole question for our examination and solution.

The master was sent to Vera Cruz to take passengers on board of the vessel he commanded. He did so. It is not pretended he made any other than the agreement usual on such an occasion. Whether the property was received and put on board by the owner or master would make no difference. If the

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last was committed out of the presence of the owner, his liability would be the same. No question therefore arises as to the authority confined being exceeded. The owner is sought to be made liable, not on the contract, but for a *tort* committed by the master, acting within the scope of his powers, in the execution of the contract.

The law relied on which furnishes the owner with an exemption on account of the misfeasance of the master and crew, on the surrender of the vessel and freight, would cause the same immunity had the owner contracted personally. If we understand the matter rightly, the immunity is independent entirely of the agreement having been entered into by the agent. For example, in England, where such a rule prevails, we do not understand that there could be the slightest difference in the responsibility of the owner for the *torts* of the master, whether the contract was for passage or freight, whether the contract was entered into with one or the other.

We repeat, therefore, that we cannot see how the question whether the agent exceeded his powers is at all involved in the inquiry before us. The moment it is admitied or

established that the master's agreement for carrying passengers was on terms such as he was authorized to make, its legal consequences must depend on other principles than those of the law of the contract of mandate: the agreement must have the same effect, as if entered into with the owner personally.

If then the defendant had gone himself to Vera Cruz, and entered into a contract with a man there which was to be performed in the island of Cuba, would it have been governed by the law of Louisiana?

Now, if there be a principle better established than any other on the subject of the conflict of law, it is, that contracts are governed by the laws of the country in which they are entered into, unless they be so with a view to a performance in another. Every writer on that subject recognizes it. Judicial decisions, again and again, through the civilized world have sanctioned it. Why then should this case form an exception? Why should the contract of affreightment, or for the conveyance of passengers, stand on different grounds than those of buying and selling merchandize? Whoever contracts in a particular place, subjects himself to its laws, as

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a temporary citizen. The idea that the law of a man's domicil follows him through the world, and attaches to all his contracts, is as novel as unfounded. The proposition was not, indeed, maintained in general terms, but that offered to the court, in relation to the contract, is identical with it, and it is impossible for us not to feel that if the defendant and appellant is to have the contract decided by the laws of Louisiana, it will be equivalent to a declaration of this amount, that an inhabitant of this state carries its laws with him, wherever he goes, and they regulate and govern his contracts in foreign countries—that whether a man contracts with him in Paris or London, our municipal regulations are the measure of the rights and duties of both parties to the contract.

That the legislature of Louisiana may have a right to regulate the contracts of her own citizens, in every country, so long as they owe her allegiance may or may not be true. But where the citizen contracts abroad, with a foreigner, it is evident the rule must be limited in its operation. The legislature may refuse permission to enforce the agreement at home; but abroad, and particularly where the agreement is entered

into, it is valid. The general rule, however, is never to extend the prohibition to contracts made abroad, unless there be an express declaration of the legislative will. Judge Story, in *Reinsdyck* vs. *Hane et al.* quotes with approbation and sanctions the rule, as given by *Casaregis Ratio, est quia statutum intelligitur semper disponere in contractibus intra et non extra territorium suum.* Disc. 130. sect. 14, 16, 21, and 22; 1 *Gallison*, 377.

We, therefore, conclude that as the master was sent with the vessel to Vera Cruz, to take passengers; as he acted as the owner's agent in making the agreement, and this is admitted by the answer; and as the limitation to the responsibility is *resisted* on grounds which would have an equal force, if the agreement had been made with him personally, we are bound, in our inquiry as to the law which governs the agreement, to consider it as made personally by the owner, and it is to be governed, not by the laws of his domicil, but by those of the country in which it was entered into and to be performed. But, although the case does not present the question of the owner's responsibility, in relation to the con-

If the owner of a vessel, residing in New-Orleans, sends her from Vera Cruz to Havana, he will be liable for the *torts* of the master, not according to the laws of Louisiana, but those of Mexico.

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tract of mandate, the agent having confined himself within his powers, yet as the argument has placed the immunity claimed by the defendant and appellant on that ground, it is well to notice it more particularly.

If we understood the arguments correctly, it was contended that the laws of Louisiana having put some limitations to the power of the master to bind the owner, any contract of the former, in a foreign country, must be subject to the limitation, and if they be exceeded, there is an end to the latter's responsibility.

Where a general power is confided to an agent, the party contracting with him is not bound by any limitation which the principal may have affixed, at the time or since, by distinct instructions. Now, in the case before us, if instructions be supposed to have been given to the master not to bind the owner beyond the value of the vessel and freight, or for any act which the latter could not prevent, would parties contracting with the former, in a foreign country, be bound by them? We think, it is certain they would not.

Every contract, which by the general maritime law the master can make, is binding on the owner. By putting the former in

command, and sending him abroad, the latter invests him with the general powers masters have as such, and those who contract with him have nothing to do with any private instruction, by which the general power may have been limited. If the limitation arises not from the owner's instructions, but from the particular laws of the country from which the vessel has sailed, must not the consequence be the same? Can these laws limit the master's power more effectually than the owner could, or can they extend farther? We think not. They have no force in a foreign country, where they are presumed to be equally unknown.

Emerigon, treating of the case where the master was prohibited from taking *des deniers a la grosse*, during the voyage, examines the question, whether those who furnished them would have an action against the owner. He cites all the texts of the Roman laws on which the negative can be maintained, and concludes that if the lender had no knowledge of the prohibitions, the owner would be responsible; that those who contract with him in a foreign country have a right to presume he is clothed with all the powers which

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belong to his station. *Bouley Paty* is of the same opinion as to the responsibilities of the owner for the acts of the master appointed by him, whom they put in command, with a special prohibition from making a subrogation of his powers. *2 Emerigon, ch. 4, sec. 8—Bouley Paty*, 289.

In another part of his work, *Emerigon* treats of the power of a master to draw bills on his owners, in a foreign port, contrary to the authority given by the ordinance, and he considers he cannot, because he exceeds the powers of his legal mandate. In support of this opinion he cites decisions in opposition to what he says was the former jurisprudence of France, founded on the authority of Valin. He seems to conclude the rule is firmly fixed as he understood it. But we find it was not generally adopted. Bouley Paty states that opinions were divided, and the chamber of commerce of Nantz, in their observations on the code of commerce, observe, it is a question often agitated, and which had been decided in different ways. *2 Emerigon, ch. 4, sec. 11*, 458: *2 Bouley Paty*, 71. The new code adopted Valin's doctrine. But *Emerigon*, who is an author of distinction, in treating of the question,

says that although the master cannot abroad go beyond the legal mandate, provided that his contract (*raccord*) or the general mercantile laws give him a more extensive power, *a moins que sou raccard, ou le droit commure, en certant cas, ne lui donne un pouvoir plus étendu.*

The general rule, where there is no statute limiting the owner's responsibility, is that he is responsible for all damages done by the master, while acting within the scope of his powers. *Abbot* states that this is the doctrine of the common and civil law, and so do all the writers we have been able to consult. In *Chancellor Kent's* late work, and in Judge Story's edition of *Abbot*, it is stated that the owner is bound for the whole amount of the injury done by the master or crew, unless where ordinances and statutes have established a different rule. 3 *Kent's Comm.* 172; *Abbot on Shipping, edition* 1829; 1 *Pothier's Obligations*, 451, and 452.

If this question turned on the master's having exceeded his powers, we are inclined to think, that as the general rule authorized him to bind the owner to the extent contracted for, the plaintiff and appellant who contracted

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with him, was unaffected by a limitation, in a statute of another country, of which he could not be presumed to have any knowledge, and to the authority of which he was not subject.

In the former case, we held that the court could take notice of the law of Mexico, although not proved as such; that the province of Louisiana and the vice-royalty of Mexico, having once formed a part of the same government, the laws were the same in each, and the separation of the two countries could not have the effect of destroying the official knowledge the court possessed of that circumstance, and we supposed that the practice in the Atlantic states, was in conformity with this opinion, and that proof was not required in either; that the common law of England was the basis of the law of the other.

In opposition to this doctrine, it has been urged that it is a novel one, unsupported by any adjudged case, and that the practice in the Atlantic states is different from what we conceive.

We have been referred to a note in *Cowen*, 525, in which the reporter professes to bring together the different cases on that head, One of them shows that the courts of Massa-

chusetts presume the common law in New York to be the same as in their own state; another, that in South Carolina, Haywood's reports were received as evidence of the common law of North Carolina, upon which we have to remark that this note does not, in our opinion, show that we were in an error. The principle, on which these cases are decided, appears to be true, and the reasoning drawn from them correct. When a court knows nothing of the laws of a country, it presumes them to be the same as those of its own. This is the general rule, and the presumption rests on the ignorance in which it is of any other. If it has judicial knowledge of the law of a particular country, the presumption does not exist. If it has knowledge of what the law once was, it presumed it was not abrogated till this be shown. Having judicial knowledge of the law of Louisiana before the retrocession, and that the law of New Spain was the same, we have knowledge of the latter, at the retrocession, and must presume it unchanged, till the change be shown.

The Courts of Louisiana having knowledge of the laws of Spain, and that they, before the revolution in South America, were the laws of the new republics, will decide cases according to those laws, unless they are shown to be abrogated.

Perhaps a better reason for deciding according to our own law is, that where we know no other by which our decision may

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be formed, we must determine according to it, or do so arbitrarily.

It has been urged that giving effect to the Mexican law is to do an injury to one of our citizens, and is contrary to sound policy: but the argument is not entitled, in our opinion, to much weight. Courts of justice, it is true, will not enforce the laws of another country *to the injury* of their own citizens; but if a citizen goes abroad and makes a contract under the law of the place, he must be bound thereby.

We are aware that were this case to be decided under the laws of this state, we would have come to a different result; but we have been pressed to reconsider our opinion in the preceding case, and we have deemed it important it should be known, that when our citizens make contracts abroad by themselves or agents, not to be executed in this state, the laws of the place do, and must, regulate their rights and duties under such contracts.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

HILL ET AL. vs. STEAM BOAT OREGON.

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HILL AND AL.
vs.
STEAM-BOAT
OREGON.

The owner of corn sold by the master of a steam-boat has no privilege on her, although her captain afterwards applies the proceeds to the use of the boat.

APPEAL from the court of the first district.

These cases commenced by attachment, and the only question was as to privilege for suplies furnished to the steam-boat Oregon.

MARTIN, J. delivered the opinion of the court.

These are attachment cases by persons who furnished supplies to the steam-boat Oregon, owned by the defendants. They were consolidated.

Appeals were taken by Bowman, one of the defendants, and Mansker and Gray et al. The plaintiffs, Hill et al., have also prayed that the judgment may be amended in their favor.

Bowman's counsel has complained that the judgment against his client is against law and equity. We are unable, after a close examination of the record, to see how this general objection may be substantiated.

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HILL AND AL. *vs.* STEAM-BOAT OREGON.

The owner of corn sold by the master of a steam boat has no privilege on her, although her captain afterwards applies the proceeds to the use of the boat.

Mansker complains he was denied a privilege for a small supply of wood, and the proceeds of a quantity of corn he had on board which was sold by the captain, and the proceeds of the sale applied to the use of the boat. The district judge was of opinion that as these proceeds were not advanced by the claimant for the use of the boat, and therefore he has no privilege. The *New Code*, *art.* 3204, gives a privilege for money lent to the captain for the necessities of the ship, and under this part of the code the claimant has no privilege; but the code gives a privilege for the reimbursement of the price of merchandise sold by the captain for the necessities of the ship. Now, it is evident this appellant's corn was sold by the captain, and the proceeds were disbursed for the use of the boat. It does not appear that the captain had any authority from the appellant to sell his corn, and the latter may present the use that was made of the proceeds of the sale as strong presumption of the intention in which it was made. It is also in evidence that this appellant supplied a few cords of wood for the use of the boat, for the price of which he has a privilege.

This appellant urges that the attachment of Hill & al. the first attaching creditors, was not legally executed, and he claims a privilege over them.

We cannot see how we can notice this: the judgment settles only the privileges of the respective claims of the attaching creditors. It settles nothing as to the preference they may have from a priority of suit We consider as nothing in this regard as settled by the judgment; it is a matter to be acted on afterwards, and we are not ready to say that a partner creditor may have all the advantages which the debtor may claim from any irregularity in the execution of process.

Gray and others claimed a privilege for a supply of liquors, sugar, coffee and groceries, for the use of the boat to the amount of upwards of one thousand seven hundred dollars.

The district court from the very great amount of the supply concluded it was to be considered, not as provisions for the use of the boat, but as merchandise bought for sale.

We think that in this respect he did not err. These appellants claim also a privi-

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lege as being among the first attaching creditors. This claim cannot be considered in the present state of the case.

Lastly, Hill & al., the appellees, have prayed the judgment to be amended by allowing them as attaching creditors a privilege for the whole of their claim, having only been allowed one fourth part of their claim, from which it results from the nature of the claim.

The observations we have made in the case of the appellants Mansker, and Gray & al. apply to these appellants. The district court has acted only on the privileges resulting from the nature of the claims.

It is therefore ordered, adjudged and decreed that the judgment of the district court, so far as it regards the appellant Mansker, be annulled, avoided, and affirmed as far as it regards the other appellants and appellees, with costs, and that the defendant Mansker recover from the defendants with privilege the sum of four hundred and thirty-seven dollars and sixty-six cents, as a privileged claim on the boat, with costs in both courts.

SMITH vs. THE FEMALE ORPHAN ASYLUM. Eastern District *June*, 1830.

If any damage be sustained by the lessee in consequence of repairs put upon the building by the lessor, the latter is responsible.

SMITH *vs.* FEMALE ORPHAN ASYLUM.

APPEAL from the parish court for the parish and city of New-Orleans.

This suit was brought to recover the value of a quantity of ice, alleged to have been lost in consequence of the defendants having removed the roof of a building, which they had leased to the plaintiff for an ice house. The defendants admitted the lease and removal of the roof, but contended that the repairs were indispensable, and made at the instance and request of the plaintiff. This ground of defence being unsupported by the testimony, there was judgment for the plaintiff, and the defendants appealed.

McCaleb, for appellant.

Preston, for appellees.

MATHEWS J. delivered the opinion of the court. In this suit the plaintiff claims damages for the loss of a quantity of ice, which loss he alleges was occasioned by improper

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conduct or negligence on the part of the defendants. After the institution of the action the plaintiff died, and it was prosecuted by his widow and son who obtained a judgment in the court below, from which the defendants appealed.

The undisputed facts of the case are the following: The appellants leased to Smith a part of a house owned by them in the Faubourg St. Mary, for the term of five years, to commence from the first of January, 1829, to be used as an ice house; at the time of the lease the house required some repairs; on the 21st of April, of the same year, the owners contracted with certain undertakers to make them, and amongst other things, to put on a new roof. The repairs were not commenced (at least so far as they related to the roof) until the middle of June, at which time the old roof was taken off; and rains which immediately succeeded destroyed about 200 tons of ice, which had been put by the plaintiff into that part of the tenement by him rented. The value of the ice is proven to have been forty dollars per ton.

According to these facts, the defendants

If any damage be sustained by the lessee in consequence of repairs put upon the building by the lessor, the latter is responsible.

are clearly responsible in damages for the loss occasioned to the plaintiffs; being a direct consequence of the misconduct of their agents (the undertakers) in removing the roof of the house, by which the property therein stored, was exposed to imminent risk and danger, especially such an article as ice, which could not fail to be suddenly and totally destroyed by exposure to rain.

A defence, however, is set up, based on an alleged acquiescence and consent of the tenant that the roof might be removed at the time when the workmen were about to take it off. The answer contains also a plea in reconvention for the value of the rent.

This defence, if supported by the testimony, would relieve the appellants from any obligation to make good the loss sustained by the appellees. Two witnesses only, out of a great number examined in the court below, are relied on as establishing the fact of Smith's assent to the removal of the roof at the time it took place. These are, Ogier, one of the undertakers to repair the building, and Mrs. Laidlow, the treasurer of the Asylum. The former proves the fact most

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explicitly; but from the impossibility to reconcile his testimony with that of many other witnesses who were examined in the case, the judge of the parish court before whom the suit was tried, seems by his judgment, not to have given much credit to this witness; and, in this respect, we cannot say that he erred. The weight of the evidence, both in relation to the number of witnesses and the facts by them declared, so contrary to the possibility of truth in those related by Ogier, leaves no doubt of the latter having fallen into mistakes, and destroys his credibility in the present instance.

From the explicit and candid manner in which Mrs. Laidlow's testimony appears to have been given, no doubt can be entertained of its truth; but it does not establish the consent of Smith to the removal of the roof of the house at the time when it was done. The latest conversation which she relates as having had with him, took place about the first of May; at that time he appeared to desire that the repairs of the house should be prosecuted, and stated that he would urge the undertakers to begin their work. The witness

saw him again in June—the repairs had then commenced—he made no complaint, &c. On her cross examination, she states that she did not know what repairs were commenced, and that Smith had been urgent only as to repairs of the front of the house. This testimony does not prove his assent, given in such a manner as to place on him the risk of loss. Taken altogether, it shows that he was desirous that the house should be put in good condition, and urged immediate repairs only to the front. The danger of loss by taking away the roof was so evident that it cannot be believed that any person of ordinary sense and discretion, having a large quantity of ice protected by it, would have consented to such a step; at least, strong, clear and indubitable proof ought to be required to establish a consent of this nature, and this is not found in the present case.

It is further objected to the plaintiff's right to recover, that the injury complained of, might not have happened if the tenant had not removed the floor of the *entré-sallé*, which the evidence shows he did. The rooms composed of the lower story and the

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second, were rented to him expressly for an ice-house, and for the term of five years. To make the tenement more profitable for such use, the removal of this floor was necessary, and could be done without injury to the proprietors, as it might easily have been replaced at the end of the term for which the premises were let, at the tenant's expense. By agreeing that these rooms should be used as an ice-house, the lessors may be considered as having impliedly assented to any arrangement of them which the lessee might deem most conducive to his profit without injury to the former. We, therefore, conclude that this defence is not available.

The case is, however, severe against the defendants, as the injury of which the plaintiff complains, was not caused by the direct agency of the proprietors of the house, consequently the damages should be reduced to the lowest amount authorized by the testimony. The loss is proven to be 200 tons of ice, (the value, forty dollars per ton) amounting to 8000 dollars. From this sum must be deducted the probable waste of the article which would have occurred

during the time it was retailing out to purchasers—say the whole summer. This waste is estimated at 25 per cent. and amounts to 2000 dollars. From the judgment of the parish court must also be deducted a little upwards of one year's rent of the store, (500 dollars) leaving a balance of 5500 dollars, for which judgment should have been rendered in the court below.

It is therefore ordered, &c. that the judgment of the parish court be avoided, reversed and annulled: And it is further ordered &c. that the plaintiffs and appellees do recover from the defendants and appellants five thousand five hundred dollars, and that the appellees pay the cost of this appeal; those of the court below to be borne by the appellants, &c.

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10 In a suit between the original parties to a due bill, the consideration of it may be enquired into, and the maker may show that the apparent was the agent of the real payee. *Lauve* vs. *Bell.* 191

11 Those who are not parties to a sale may prove its simulation by parol. *Prudence* vs. *Bermodi et al.* 234

12 Acts under private signature have no date against third persons, except that on which they are produced in court, unless supported by evidence *aliunde* showing the real time of their execution, but this circumstance, in which they differ from authentic acts, does not prevent their being given in evidence for what they are worth. *Phillips* vs. *Stanley.* 244

13 Where a private act relates to land, and there is proof of possession by actual delivery accompanying the transfer, it may be received in evidence. *Same case.* *ib.*

14 Evidence of the receipt of a sum of money for a slave, and a promise to warrant the title, is sufficient evidence of a sale, and a document which contains evidence of

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these two facts, is a bill of sale and admissible evidence. *Hitchcock* vs. *Harris*. 311

15 Whether parol evidence can be received of a promise to warrant the soundness of a slave ?—*Quere ? Same case.* *ib.*

16 Parol confessions of a party, made orally, should be received with great caution. *Morehead* vs. *Thompson et al.* 281

17 The deposition of a witness, taken on a former trial for a previous year's rent, is proper evidence on a trial between the same parties for the rent of a subsequent year. *Williams* vs. *Bethany*. 315

18 Judgment against the tutor is *prima facie* evidence against a third possessor, but if a collusion be pleaded, and it be denied that the tutor was not chargeable with any thing, evidence to the contrary must be produced by the minor. *Serapurn* vs. *La Croix*. 373

FAMILY MEETING.

1 The proceedings of a family meeting are valid, although written and recorded in the French language. *Maxent et al.* vs. *Maxent*. 438

FOREIGN LAWS.

1 Foreign laws must be proved like other facts, but where the country, now foreign, once made a part of the same empire,

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with that in which the proof is to be administered, the laws common to both at the time of separation do not require proof in either, and they will be presumed to remain the same, unless the contrary is proved. *Malpica* vs. *McKnown et al.* 248

2 If the owner of a vessel, residing in New-Orleans, sends her from Vera Cruz to Havana, he will be liable for the *torts* of the master, not according to the laws of Louisiana, but those of Mexico. *Arayo* vs. *Currell.* 528

3 The courts of Louisiana having knowledge of the laws of Spain, and that they, before the revolution in South America, were the laws of the new republics, will decide cases according to those laws, unless they are shown to be abrogated. *Same case.* *ib.*

FRUITS.

1 Where property producing fruits is sold on a credit, the vendee owes no interest on the price until after a delay of payment. *Jiovelina* vs. *Minor et al.* 72

HUSBAND AND WIFE.

1 When the action is on a contract of the wife *dum sola*, the husband can only be brought into court, to aid the wife in her defence. *Greenleeze* vs. *Penny et al.* 241

INSOLVENT.

1 The sale of stock by the syndics of an insolvent who was bound to return it, changes

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the nature of the obligation into one for the payment of money, puts the parties in the precise situation of creditor and debtor, and gives rise to compensation. *Saul* vs. *His Creditors.* 302

2 The act of 1817, requiring opposition to the tableau of an insolvent to be filed within a limited time, does not apply to creditors who are not placed on the bilan. *Suares* vs. *His Creditors.* 341

3 The situation of an insolvent debtor is analogous to that of one who has ceded his goods: in either case all passive debts of the debtor may be exacted, whether the day of payment has, or has not arrived. *Atwill* vs. *Belden et al.* 500

4 The purchaser of the property of an insolvent debtor, on the sale being declared illegal, has the option of paying the creditor or surrendering the property; if he does neither, execution may issue against him. *Same case.* *ib.*

INTERROGATORIES.

1 A defendant who is interrogated on facts and articles, has a right to qualify his answers, by stating other facts pertinent to the issue and connected with the facts which the plaintiff seeks to establish. *Lauve* vs. *Bell.* 191

2 When the answers of a garnishee to interrogations are sought to be disproved the gar-

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nishee must have notice. *Rockwell et al.* vs. *Smith et al.* 228

3 Where the return of the commission shows that the interrogatories were all answered, the circumstance of their not being answered separately and by number, does not vitiate the return. *Miller* vs. *Breedlove.* 321

4 If the court direct the answer to be served on the plaintiff, and that he should answer the interrogatories, it is a conditional order, and the plaintiff is not bound to answer until a copy of the answer be served on him. *Desfarge et al.* vs. *Desfarge et al.* 365

5 When a witness is to be examined on interrogatories, if an opportunity, as pointed out by law, be given to the adverse party to file cross interrogatories, notice of the time and place of taking the answers is not required. Therefore, if the commissioner give an erroneous one, the mistake will not be fatal. *Gasquet et al.* vs. *Johnson et al.* 425

INTEREST.

1 The judgment cannot include interests if a *remititur* therefor be entered of record. *Flower* vs. *Williams.* 22

INVENTORY.

1 A public inventory is a ministerial act, and may be made by a notary, but the right of deciding whether an inventory should

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be made or not, is a judicial act, and if the Judge be interested he cannot act. *State* vs. *Favrot.* 49

2 When the inventory is false and fraudulent, all proceedings growing out of it must be set aside. *Casanovas' heirs* vs. *Acosta et al.* 179

JOURNEYMEN PRINTERS.

1 Journeymen printers are laborers within the meaning of the Civil Code, art. 3499, and their wages are prescribed by the lapse of one year. *Teitjen* vs. *Penniman.* 267

JURISDICTION.

1 The court of probates may discharge a curator irregularly appointed. As an administrator *de son tort* he may be answerable to creditors for waste, but that suit against him must be brought in the courts of ordinary jurisdiction. *McDonough* vs. *Spraggins.* 61

2 Courts of Probates are courts of limited jurisdiction; and can only reach cases provided for by statute. *Palmer et al.* vs. *Palmer et al.* 99

3 When the object is to set aside a former settlement of an estate on the ground of simulation and fraud, the court of probates is not the proper tribunal *Benoit* vs. *Hebert et al.* 212

4 The parish court is the only competent tribunal to issue orders of seizure and sale for

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the payment of repairs done upon roads and levees. *Mc Donough* vs. *Duplantier.* 223

5 Their power in this respect under the act of 1807, is not affected by the enactments of the Code of Practice limiting their jurisdiction to cases not exceeding three hundred dollars. *Same case.* *ib.*

6 It is the sum claimed and not that for which judgment is rendered which confers jurisdiction on the court. *Phillips* vs. *Stanley.* 244

7 The District Court cannot act on claims against a succession. *Delancy* vs. *Beale.* 495

JURY.

1 It is the province of a jury to ascertain whether drugs and medicines intended for sale to other than patients, for profit, constitutes a commercial partnership. *Flower* vs. *Williams.* 22

JUDGMENT.

1 A judgment not against defendants jointly and severally is a several judgment. *Pemberton* vs. *Grass.* 81

2 Judgment cannot be rendered before issue joined, or an opportunity for defence. *Rockwell et al.* vs. *Smith et al.* 228

LAND.

1 When both certificates issued under the same act of Congress, there is no difference in regard to the time at which the parties

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acquired from the government of the United States. *Higgins et al.* vs. *McMicken.* 53

2 A donee of land from the government of the United States must take it subject to all the burthens, conditions and limitations, which the donor has thought proper to affix to his gift. *Same case.* *ib.*

3 The acts of Congress in relation to actual settlements in Florida, unsupported by written evidence of claim, do not recognize titles; they make gifts. *Ibid.* *ib.*

4 A person who has no title to land, cannot claim damages from the owner for selling it as the property of a third person. *Ibid.* *ib.*

5 A survey made before any application to the Spanish government, may be given in evidence where it forms part of the *res gesta.* *Swift* vs. *Williams et al.* 165.

LESSOR.

1 If any damage be sustained by the lessee, in consequence of repairs put upon the building by the lessor, the latter is responsible. *Smith* vs. *Female Orphan Asylum.* 547

LEVEES.

1 When the Police Jury adjudicate the work to be done on levees, and undertake to pay therefor, payment cannot be withheld on the ground, that the owner of the land must be first resorted to. *Croizet* vs. *Police Jury of Point Coupee.* 103

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2 The owner may be bound in justice and equity, to refund to the parish, but he cannot be made a party to the action where the police jury is sued for the price by the party to whom the contract was adjudicated. *Same case.* *ib.*

MORTGAGE.

1 An express agreement not to alienate, in an act of mortgage, relieves the mortgagee creditor from the necessity of pursuing all the steps, required by the hypothecary action in ordinary cases. *Donaldson* vs. *Maurin.* 29

2 Where personal obligations are imposed on a vendee by the terms of the contract, he cannot relieve himself from them by a sale of the mortgaged property to a third person without the consent of the vendor. *Same case.* *ib.*

3 The right of commuting mortgages is granted only in respect to tacit or legal mortgages, imposed by law on the estate of tutors and curators. *McCall* vs. *Mercer.* 343

4 Whether it extends to tutors who were in office at the time of the passage of the act. *Quere?* *Same case.* *ib.*

5 The recorder of mortgages must make mention in his certificates of all donations recorded, and he has no discretion to exercise as to the validity or effect of the acts recorded. *Sacerdotte* vs. *Duralde.* 482

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NEW-ORLEANS.

1 The ordinance of the mayor, aldermen and city council of New-Orleans, of September, 1827, imposing a tax on the front proprietors of ground, within the city and incorporated faubourgs, for the exclusive purpose of paving the streets, and making the banquets, violates neither the constitution of the United States nor that of Louisiana. *Oakey* vs. *Mayor et al.* 1

2 The exclusive privilege granted by the city council to sell oysters at designated places on the levee, does not prohibit their being sold at other places within the city. *Rosa* vs. *Mayor et al.* 126

NOVATION.

1 A creditor who, on receiving a new note, surrenders the first, novates his debt, the sureties it had for the payment of the first are discharged, and the accommodation indorser must be so, if his name be not on the note taken to renew the former. *Morgan et al.* vs. *Their Creditors.* 527

NOTICE.

1 Notice by mail to the indorser must be put in the post-office, the next mail day after the protest, otherwise the indorser is discharged. *Townsley et al.* vs. *Springer.* 122

PARAPHERNAL PROPERTY.

1 Property conveyed to the husband in lieu of

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a sum of money inherited by the wife, is paraphernal. *Savenat et al.* vs. *Le Breton et al.* 520

2 The rigor of the law, which declares that property acquired during marriage, shall be considered as common to both husband and wife, although purchased with the separate funds of one of them, is applicable only to acquisitions made by purchase, and does not necessarily include things which may be received by either of them, in payment for money due to them in their separate and individual rights. *Same case.* *ib.*

PARTNER.

1 When one partner purchases articles for his own use, the partnership is not bound. *Flower* vs. *Williams.* 22

2 Until a failure or insolvency, the right to seize the undivided interest in partnership property of one of the partners cannot be doubted. *Croft* vs. *McKneely et al.* 101

3 Whether stipulations in contracts of partnership, by which they may be continued after the death of one of the partners for the benefit of his heirs be binding on the latter without their consent. *Quere?* *Louisiana Bank* vs. *Kenner's Succession.* 384

4 According to the laws and usages of commerce, as they prevailed at the time of the adoption of the code of 1808, no stipulation could be made by partners absolutely

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binding on the heirs of one of them, who should die, to continue the partnership after his death, and be made responsible for contracts made in the partnership name. *Same case.* *ib.*

5 The instructions from one partner to another, when both are equal in interest, are to be considered in the nature of advice, subject to be deviated from acoording to circumstances. *Cougot* vs. *Rodriguez.* 508

PARTITION.

1 Before the code of 1808, on a partition, co-heirs had no legal mortgage on the property allotted to them. *Laralde et al.* vs. *Derbigny.* 85

PRACTICE.

1 When the appellant relies solely upon errors of law apparent on the face of the record, they must be specially assigned within ten days after the record is brought up, otherwise the appeal will be dismissed. *Lacy* vs. *Fluker.* 50

2 The ordinary plea of no error on an appeal does not cure the want of assignment of errors. *Same case.* *ib.*

3 When a defendant has not prayed below for relief against his co-defendant, who was brought in only as regards any interest he might have in the premises, the sale of which was prayed for, he cannot have any on the appeal. *Parker* vs. *Richardson.* 65

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4 Where a party is ordered to produce papers, until he does so, or shows that it was not in his power to comply with the order, the cause ought not to be tried. *Woodruff* vs. *Bradford et al.* 114

5 A demand for compensation in consequence of slander is not contrary to, and does not exclude a demand for damages for false imprisonment. *Buquet* vs. *Watkins.* 131

6 It is a sound principle of construction never to consider laws as applying to cases which arise previous to their passage, unless the legislature declared such to be their intention. *Donaldson* vs. *Winter.* 137

7 Where the existence of a debt is at issue, the plaintiff may proceed to establish his claim, notwithstanding the insolvency of his debtor. *Grainer* vs. *Devlin.* 169

8 Where a cause is transferred, testimony taken in the court of the first instance is admissible in that to which it is transferred. *Same case.* *ib.*

9 A proposition does not become an agreement, until the party to whom it is made accepts it, and it must be accepted precisely as made, unless the proposer agrees to a variation. *McDonough* vs. *Winchester.* 188

10 If the plaintiff does not make out his case, judgment of non-suit will be given. *Kimball* vs. *Dreher.* 208

11 The court properly rejected evidence to

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prove a fact which was not set forth in the petition. *Benoit* vs. *Hebert et al.* 212

12 Where the laws of the place where the owner resides, and that of the country where the contract of affreightment is entered into, and to be fulfilled, differ, the latter governs. *Malpica* vs. *McKnown et al.* 248

13 In a contract to build, when a plan is furnished and referred to in the contract, the undertaker is governed by the plan. *Suarez* vs. *Duralde.* 260

14 A plea in reconvention need not be answered in writing. *Same case.* *ib.*

15 An architect may be examined as to the usage of the trade under a contract to build, but he cannot give his opinion as to the construction of the contract. *Same case.* *ib.*

16 An amicable demand is still required although the code of practice dispenses with a written one. *Tietjen* vs. *Penniman.* 267

17 The capacity of persons suing as heirs need not be proved unless it be specially denied. *Morehead* vs. *Thompson et al.* 281

18 Where an account is called for, the general rule is, the statement furnished cannot be divided. *Same case.* *ib.*

19 The defendant causing a copy of the judgment to be served on the plaintiff, is not such an execution of it as deprives the former of his appeal. *Leggett* vs. *Peet et al.* 288

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20 The plaintiff must make out his title to the instrument sued on, and if the contract by which he acquired it was null and void, it can produce no effect whatever. *Same case.* *ib.*

21 In a suit for holding over after the expiration of a lease, an offer of possession must be specially pleaded. *Williams* vs. *Bethany.* 315

22 If a tableau be homologated in all parts which have not been opposed, &c. the homologation is absolute. *Kenner et al.* vs. *Their Creditors.* 370

23 When the plaintiff failed to make out his case, judgment of non-suit was properly rendered. *Wilson* vs. *McHugh et al.* 380

24 Dilatory exceptions must be plead *in limine lites.* *Howard et al.* vs. *Steam Boat Columbia.* 417

25 The amicable demand must be specially denied in order to put the plaintiff to proof of the fact. *Same case.* *ib.*

26 The rights of different creditors are to be examined in concurrence only in cases of actual insolvency, either by a voluntary or forced surrender on the part of a debtor. *Gasquet et al.* vs. *Johnson et al.* 425

27 No distinction exists between suits prosecuted in the ordinary mode by citation, and those which are pursued by attachment. *Same case.* *ib.*

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28 If A direct his debtor to pass his balance to the credit of B, who is a debtor of the latter, and it is so done, A's claim is extinguished. *Amezago* vs. *Vallego et al.* 216

29 Suit against a third possessor, by a forced heir for his *legitime*, cannot be brought until the donee's or legatee's property be first discussed. *Hodder* vs. *Sheppard et al.* 505

PRIVILEGE.

1 The proper time for settling a question of privilege is upon filing a tableau of distribution. *Grainer* vs. *Devlin.* 169

2 The owner of corn sold by the master of a steam-boat has no privilege on her, although the captain afterwards applies the proceeds to the use of the boat. *Hill et al.* vs. *S. B. Oregon.* 543

REDHIBITORY VICES.

1 With the knowledge of redhibitory vices in a slave, the attempt to impose him on another as free from them is fraudulent. *Back* vs. *Meeks.* 309

2 A defendant is liable under his warranty whether the redhibitory defects be known to him or not. *Same case.* *ib.*

RES JUDICATA.

1 The plea of res judicata, like that of prescription, may be plead at any stage of the cause. *Williams* vs. *Bethany.* 315

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SALE.

1 Where there is a difference between the description of land seized and that sold, no title passes under the sale. *McMicken* vs. *Bradford et al.* 42

SHIPS.

1 The owner of the vessel is responsible for the acts of the master within the scope of his employment, even for his torts. *Malpica* vs. *McKnown et al.* 248

2 The value of the vessel does not furnish the measure of responsibility. *Same case.* *ib.*

3 Whether the captain is responsible for money in a trunk of which no declaration is made when brought on board? *Quere?*—But he is, if it is known to him after the passenger's death, and he does not take care of it. *Same case.* *ib.*

4 It is the duty of the captain of a vessel to take charge of the effects of a passenger who dies on board. *Same case.* *ib.*

5 The master of a vessel who refuses to deliver goods on other grounds than the non-payment of freight, cannot avail himself of the want of a tender. *Fernandez* vs. *Selva et al.* 269

6 A shipper cannot be effected by the master taking on board other goods, the landing of which would expose the vessel to seizure and condemnation. *Same case.* *ib.*

7 A shipper cannot demand the delivery of his

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goods if the landing of them would expose the vessel to seizure. *Patron* vs. *Selva et al.* 275

8 The insurers are liable for all the labor and expense attendant upon an accident which forces the vessel back into port, but not for a claim for commission on the whole amount of the cargo. *Shiff.* vs. *Lou. Ins. Com.* 304

9 If the owner voluntarily receive the goods at an intermediate port, such an acceptance constitutes the basis of the rule for a *pro rata* freight. *Vance et al.* vs. *Clark et al.* 324

10 In the case of a general ship, or one chartered for freight to be paid according to the quantity, freight is due for what the ship delivers ; but, if the ship be chartered at a specific sum for the voyage, the freight cannot be apportioned unless in special cases. *Same case.* *ib.*

SHERIFF.

1 A Sheriff cannot sell an undivided part of a defendant's property ; but must sell a distinct portion, and then another, until he has raised a sufficient sum. *McDonough* vs. *Elam et al.* 489

SIGNATURE.

1 It is not necessary to prove the defendant's signature to a note unless it be specially denied. *Miller* vs. *Cohea.* 486

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STEAM-BOATS.

1 The owners of a steam-boat are liable for the acts of their captain: if he neglect to carry goods, the measure of damages is, the difference between the value of them at the period when they ought to be landed, and their value when they are. *Lowery* vs. *Young et al.* 232

2 The fact that the vessel of the plaintiffs was run aground while towed by a steam-boat, raises a presumption of negligence and misconduct on the part of the captain of the boat, which renders its owner liable to an action. *Smith et al.* vs. *Pierce et al.* 349

3 Owners of steam tow-boats are liable as common carriers. *Same case.* *ib.*

SUCCESSION.

1 Where property of a succession has passed into the hands of third persons, the courts of ordinary jurisdiction, not those of Probate, must be resorted to for relief. *Casanova's heirs* vs. *Acosta et al.* 179

SUPROGATION.

1 The purchaser of mortgaged premises is not subrogated to the mortgagee's right, although he pay the price to the mortgagor, who immediately, and in his presence, pays it over in discharge of the mortgage. *Serapurn* vs. *La Croix.* 373

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2 It is immaterial whether the mortgagor use his money or any other, to discharge the mortgage. *Same case.* *ib.*

3 The legal subrogation which is created by payment made by a debtor, who being bound with or for another, has an interest in discharging the debt, is as extensive as any express subrogation. *Cox* vs. *Baldwin.* 401

SYNDIC.

1 One Syndic, where others are appointed, is not the representative of the creditors, and it is only as such, that suit can be maintained for matters relating to the insolvent's estate. *Relf* vs. *Collins et al.* 40

TAX.

1 A tax laying a certain sum on the owners of all property of a particular description, is a tax on property. *Oakey* vs. *Mayor et al.* 1

2 Taxation need not be uniform. *Same case.* *ib.*

3 The corporation of New-Orleans have a right to lay a tax to provide for a prospective deficiency. *Same case.* *ib.*

VACANT ESTATE.

1 No proceedings can be had by the creditors of a vacant estate to establish their claims, till a curator be appointed to it, or the estate be insolvent, and a syndic or syndics be legally appointed. *McMicken* vs. *Ficklin.* 45

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2 The personal responsibility of a curator does not devolve on his curator. *Moorhead* vs. *Thompson et al.* 231

VENDEE.

1 A vendee cannot be cited in warranty. *Donaldson* vs. *Maurin et al.* 29

WARRANTY.

1 A third person cannot be cited in warranty who wishes to avail himself of the provisions of the code of practice in his favor, must file his opposition in his answer to the citation in warranty. *Donaldson* vs. *Maurin et al.* 29

WILL.

1 A party who claims under a will, may sue in the name by which he is therein designated. *Donaldson* vs. *Maurin et al.* 29

2 The rule that in doubtful cases the presumption is, that a testator intended to dispose of his property in conformity with the dispositions of the law, is applicable only when the dispositions of the testator are so confused and uncertain that no effect can be given to them, and which would, of necessity, leave the distribution of his property to the operation of the law. *Poydrass* vs. *Poydrass et al.* 153

3 The continuance of an executor's functions by the Probate judge, after the expira-

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tion of the year, enables him to maintain an action. *Swift* vs. *Williams et al.* 165

4 The declaration of a testator that property was common, when in truth it was not, must be regarded as a disguised donation, and consequently null and void. *Casanova's heirs* vs. *Acosta et al.* 179

WITNESS.

1 A witness may testify to his belief of a fact, if examined as to the grounds of his belief, and his answers are vague, the court will instruct the jury. *Flower* vs. *Williams.* 22

THE END.